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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 906

VIRGINIA ELECTRIC AND POWER COMPANY,

Appellant,

v.

WILLIAM A. JOHNSON, COMMISSIONER OF REVENUE OF NORTH CAROLINA,

Appellee.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Dated June 5, 1961.

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BRIEF IN OPPOSITION TO MOTION TO DISMISS

I.

INTRODUCTION

Our reply to the Motion to Dismiss filed in this case will be brief. But we cannot leave unanswered certain statements in the Motion. In our view, those statements obscure an issue of importance clearly raised and erroneously determined in the courts below.

II.

THE FEDERAL QUESTION WAS PROPERLY RAISED AND ADVERSELY DETERMINED

The Appellee urges that the Appellant did not raise the constitutional question in the proceedings below. It asserts that the Appellant

> ". . . has attempted to inject a federal question into this case where none existed originally." (Motion, p. 3)

Nothing could be further from the facts.

The Appellant asserted its constitutional rights in the first pleading filed in the first court, the complaint filed in the Superior Court of Wake County, North Carolina. It there said that the action of North Carolina's tax officials and its statute

> ". . . constitute, as applied to the plaintiff, an undue burden on interstate commerce and are unconstitutional in that they violate the 14th Amendment to and Commerce Clause of the United States Constitution."

This is unmistakable.

But the Appellee says that this issue was not raised before the North Carolina Tax Review Board (Motion, p. 2). Of course, it was not. An administrative agency cannot decide that the statute under which it operates is unconstitutional. *Manufacturers Ry.* v. *United States*, 246 U. S. 457 (1918); *Engineers Public Service Co.* v. *S. E. C.*, 138 F. 2d 936 (D. C. Cir., 1943), dismissed as moot, 332 U. S. 788 (1947); *Panitz* v. *District of Columbia*, 112 F. 2d 39 (D. C. Cir., 1940); *Leiner* v. *Rossell*, 121 F. Supp. 27 (S. D. N. Y., 1954). Furthermore, this case was not an appeal from the Tax Review Board; it was a new judicial proceeding brought after payment of the excessive tax. The proceeding before the Tax Review Board terminated with its action; the suit to recover the excessive tax involved the first judicial step in this case. Thus it was not only unnecessary but futile to raise the constitutional issue before the Board.

The Superior Court decided the constitutional issue in clear terms. It said that the action of the North Carolina tax officials did not offend constitutional limitations (Statement as to Jurisdiction, App., p. 12).

Again, the Appellant raised the question in the Supreme Court of North Carolina. In its Assignment of Errors, the Appellant asserted that the tax as assessed

> "... constituted a burden on interstate commerce and deprived the plaintiff of its property without due process of law in violation of ... the Constitution of the United States. ..."

And the Supreme Court of North Carolina decided the issue. It said:

> "The income tax computed by defendant here on VEPCO for the year 1953 is not open to constitutional objections as operating to tax extraterritorial income in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution, or as being an unconstitutional burden on interstate commerce." (Statement as to Jurisdiction, App., p. 33)

It is difficult, therefore, to comprehend the argument that a Federal question was not presented and decided (Motion, pp. 5-8). It may be, perhaps, that the Appellee believes that the Federal question must be the only question presented below in order to gain access to this Court. It is true that other questions were presented to the courts below, for the Appellant conceived that the excessive tax was as little authorized by North Carolina's statutes as by the United States Constitution. It presented, as was the obligation of counsel, to the North Carolina courts questions of statutory interpretation that have now been determined adversely by the North Carolina Supreme Court; it also urged the question it presents here and that question was clearly decided.

The Federal question is now properly before this Court.

III.

THE SUBSTANCE OF THE CASE

The Appellee urges that both courts below found that the allocation formula used by North Carolina attributed to North Carolina no more than was reasonable; it asserts that these are findings of fact not to be reviewed by this Court (Motion, pp. 8-9).

It bolsters its argument by an odd analysis of *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U. S. 123 (1931). It

points out that there the formula that was proposed for use allocated to North Carolina four to five times the percentage of net income that was attributable to North Carolina on the separate functional allocation; it seems to believe that the relationship of 66⅔% to 85% of net income by formula is tremendously out of proportion to the 17% by the separate allocation.

The inference is that no similar disparity exists in this case. In fact, it does. The tax in this case was levied on 6.17% of the Appellant's net income; on the basis of the separate allocation by States, 1.79% of the Appellant's net income is properly assigned to North Carolina.[1] The relationship between what was taxed and what was properly taxable in North Carolina is substantially the same in this case as the relationship that existed in *Hans Rees*.

We do not urge, as the Appellee seems to insist (Motion, p. 10), that mathematical exactitude is desired or required. We recognize that there is a band of reasonableness; all that we urge is that the band does not extend to the point where a State can with impunity levy what is in fact a 20% tax on the Appellant while it levies only a 6% tax on other foreign corporations doing business in North Carolina.

This is a case to which the *Hans Rees* rule applies. Here, as in that case, more than one State was competent to levy a tax. Here, as there, evidence was presented which showed that the

> "... State has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction." (283 U. S. at p. 134)

[1] These percentages appear in or may easily be computed from Exhibit 3.

Here the result should be the same as in *Hans Rees*.

The Appellee does not comment on the evidence presented by the Appellant. That evidence was complete. Mr. Justice Douglas in *Butler Bros. v. McColgan*, 315 U. S. 501 (1942), said:

> "If factors which are responsible for that net income are present in other States but not present in California, they have not been revealed. At least in absence of that proof, California was justified in assuming that the San Francisco branch contributed its aliquot share. . . ." (315 U. S. at p. 509)

Here the factors which were present in Virginia and not present in North Carolina were shown to the courts below in detail. North Carolina was justified neither in assuming nor in finding that its allocation formula as applied to the Appellant did not tax income properly attributable to Virginia.

The courts of a State cannot have the final say as to whether a particular amount of net income is reasonably attributable to the particular State. That is, contrary to the stand taken by the Appellee, the prerogative of this Court (Statement as to Jurisdiction, P. 6, n. 2).

Finally, the Appellee does not mention the factors of the public interest that make review of this case important. We referred in the Statement as to Jurisdiction to the efforts of the various States to extend their sources of revenue and, to this end, to tax foreign corporations to the limit. Here, as in other instances, the State has gone beyond the permissible limit. A foreign corporation does not vote; it has no friend at the legislative or administrative court. Its sole remedy is to come to this Court where and where only the boundaries of the State taxing power are established. Nor is this a question of the corporation alone; if

States are permitted by unfair taxation to build walls less visible but of greater strength than any raised by a protective tariff, the free economy of the United States will be throttled as effectively as in the days of the Articles of Confederation.

The public interest suffers materially when States are not kept within constitutional bounds in the exercise of the taxing power. Only this Court can enforce the rules. At a period when the States show every desire to disregard the rules established by this Court, it should, by a review of this case, reaffirm the vigor of those rules and require compliance with them.

IV.

CONCLUSION

The Motion to Dismiss raises issues without substance and it should, we submit, be denied. We ask the Court to note probable jurisdiction of this case and to set it down for full hearing.

Respectfully submitted,

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